IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

AMERICAN WASTE MANAGEMENT AND RECYCLING, LLC. Plaintiff, v. CEMEX PUERTO RICO; CANOPY ECOTERRA CORP, Defendants.	Civil No. 07-01658-JAF Breach of contract; collection of moneys; damages. Jury trial demanded.

OPPOSITION TO "MOTION REQUESTING ORDER"

TO THE HONORABLE COURT:

COMES NOW Defendant **CEMEX PUERTO RICO** (hereinafter, "CEMEX") and through the undersigning attorneys, respectfully states and prays:

On Friday, August 17, 2007, plaintiff American Waste Management and Recycling, LLC ("AWMR"), filed a "motion requesting order". The motion is premised on alleged (1) bad faith conduct on the part of CEMEX, and (2) events related to AWMR property located at the CEMEX cement plant in Ponce. CEMEX respectfully submits that AWMR's Motion is unwarranted.

In order to clarify all facts, this motion will first explain the August 17, 2007 events. It will then provide a much needed description of the Ponce Cement Plant and the location of the materials in controversy, to explain AWMR's observations that Ecoterra personnel was present in CEMEX property (although not in the cement plant). Finally, CEMEX will reiterate its position regarding the motion for temporary restraining order.

A. AUGUST 17, 2007 EVENTS AT CEMEX'S PONCE CEMENT PLANT.

Through CEMEX counsel that is not of record in the instant claim, Plaintiff requested a meeting to take inventory of AWMR materials and equipment in the CEMEX Ponce Cement Plant. CEMEX agreed to the inventory in good faith, following its attempts to solve the impasse between Ecoterra and AWMR since before the litigation was commenced. CEMEX, however, did NOT authorize an inspection of all facilities at the Ponce cement plant, much less of all CEMEX operations in Puerto Rico.

Plaintiff and Ecoterra representatives arrived at the Ponce cement plant on Friday, August 17, 2007, at around 11:00 on the morning. CEMEX personnel escorted the visitors through the cement plant to the designated area for storage and loading of the scrap materials to be removed from the plant. However, Mr. Abul Shah, AWMR's representative, kept walking through the facility and taking photographs of areas that have NO dismantled material, have NO equipment or property belonging to AWMR, and have NONE of the removed or harvested materials AWMR claims to own.[1]

During Mr. Abul Shah's unannounced inspection, Mr. Barsotelli complained that it be for inventory purposes only, and that they should not waste time wandering through the facility. A controversy arose, *once again*, between Ecoterra and AWMR representatives. Caught in the middle of the dispute, CEMEX requested the parties to only take photographs of the materials and equipment to be inventoried and to please head to the designated area.

Once they reached AWMR's working area, AWMR made a couple of observations to its attorneys and **took no inventory whatsoever.** Furthermore, Mr. Abul Shah was unable to verify any of the alleged valuables in AWMR's trailer office, or even inside the containers, because he did not bring AWMR's keys.

At no point were AWMR representatives forced or even asked to leave the Ponce cement plant. They could remain as long as they needed to take inventory of their possessions. As such, the only actual prohibition by CEMEX

[1] The situation remains the same since CEMEX stayed AWMR and Ecoterra's execution of the project. At that point, AWMR personnel removed all materials that were dismantled and transferred them to AWMR's designated area. Here, they parked the machinery in such a way as to block all containers from being moved. The pieces which were never loaded are still laying about on the floor of the designated area. Mr. Abul Shah was not present on the day that AWMR secured all its belongings. From the next day on, CEMEX's security company assigned a guard to this area 24 hours a day.

was the taking of photographs of the Ponce cement plant in general, especially given Ecoterra's opposition. Ecoterra and AWMR representatives left around 1:30 in the afternoon.

B. CEMEX CONSENTED TO AWMR'S PRESENCE IN THE PONCE CEMENT PLANT AND NOT AT CEMEX TRANSPORT FACILITIES, WHICH ARE UNRELATED TO THE PONCE CEMENT PLANT, FALL UNDER DIFFERENT MANAGEMENT AND ARE UNRELATED TO THE DISMANTLING AND REMOVAL CONTRACT WITH ECOTERRA.

Plaintiff claims that metal removed by AWMR is lying in an area called by AWMR personnel the "motor pool," a different site owned by CEMEX. According to Mr. Abul Shah's statement, AWMR personnel stored its machinery and "effect[ed] a lot of cutting of metal it was extracting" in such premises. Ex. 1, Motion Requesting Order. Simply put, this is not true.

On Friday August 17, 2007, AWMR was intent on visiting CEMEX Transport facilities. This CEMEX property is dedicated to material transportation and storage of mobile (or movable) property (i.e. cement trucks). This facility is independent to the Ponce cement plant, has different management and personnel, and responds directly to CEMEX's offices in Guaynabo, Puerto Rico. These facilities include a mechanic shop and storage facilities for CEMEX's movables.[2]

[2] As such, this property is evidently not included in the plans of the Cement Plant used for the Scope of Work. See Exhibit 2, which includes the plans for the cement plant and for the lime plant.

All work, operations and activities within this particular facility are entirely unrelated to AWMR's sub-contracted work performance. The attached Scope of Work authorized by CEMEX personnel for the execution of the project, does not include entry to such a locale. See Exhibit 1. As such, there is and should be **no** AWMR property in those premises.

Canopy Ecoterra is currently performing an entirely different contract related to the dismantling and removal of CEMEX transport movable property (i.e. trucks). It is executing the contract exclusively within those facilities. Not only are both CEMEX facilities for different CEMEX services, they are located in different places, separated by fences and other individual properties. The performance of the other contract by Canopy Ecoterra is completely unrelated to AWMR's alleged property and work execution subcontract. See Ex. 1 Scope of Work.

Furthermore, Canopy Ecoterra trucks are allowed to enter the Ponce Cement plant to use the weigh station. However, the weigh station is located on the east side of the Cement Plant, opposite to AWMR's designated area for the machinery, scrap material and containers in controversy. See Exhibit 2 (AWMR containers, equipment and materials are located in pink area; Weight station is located in yellow area).

AWMR and Mr. Abul Shah are unjustifiably intent on visiting such facilities, and are misstating the facts. CEMEX Transport management and administration are unrelated to the Ponce Cement Plant; its premises and equipment was NOT within the scope of work related to AWMR's subcontract, and has NO AWMR property. The presence of Ecoterra personnel and their actual work execution is being performed under a contract which is irrelevant to the instant case.

C. OPPOSITION TO AWMR'S MOTION FOR TRO.

Finally, CEMEX reiterates its position regarding the Motion for a temporary restraining order filed by plaintiff:

1. CEMEX is not a party to the agreement between Ecoterra and Plaintiff. The controversy is strictly between contractor and subcontractor.
2. CEMEX has no say or objection to either party's request regarding the removal of machinery and "harvested" material, as long as CEMEX property, personnel and operations are respected and protected.
3. CEMEX stayed all dismantling and removal of scrap in its Ponce facilities once plaintiff and Ecoterra's

dispute arose. CEMEX took security precautions to prevent the disappearance of the dismantled and removed material in controversy.

4. CEMEX does, however, have an interest in the **prompt resolution** of this controversy, as the delay in the project may affect its operations in the long run.

WHEREFORE, CEMEX Puerto Rico prays this Honorable Court to deny Plaintiff's motion requesting order.

RESPECTFULLY SUBMITTED.

I HEREBY CERTIFY that today I electronically filed the foregoing with the Clerk of the Court using CM/ECF system which will send notification of such filing to all counsel of record.

In San Juan, Puerto Rico, this 28th day of August 2007.

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